

STB Finance Docket No. 34304, The Burlington Northern and Santa Fe Railway Company  
—Trackage Rights Exemption — The Portland & Western Railroad, Inc.

The draft decision before you denies a motion to dismiss that was filed by The Burlington Northern and Santa Fe Railway Company in conjunction with the trackage rights notice of exemption in this case.

BNSF originally characterized the trackage rights over its 27.9-mile line between Bush and Albany, OR, as incidental to a lease transaction filed by the Portland & Western Railroad in STB Finance Docket No. 34255. However, a decision served on December 12, 2002, in that case questioned whether the trackage rights were incidental to the transaction and suggested that the parties submit a separate filing or demonstrate why a separate filing is not necessary.

As a result, on December 20, 2002, BNSF filed a verified notice of exemption under 49 CFR 1180.2(d)(7) to obtain authorization for the overhead trackage rights. Then, on December 23, 2002, BNSF filed a motion to dismiss the notice of exemption, arguing that separate Board authorization of the trackage rights is unnecessary. Replies in opposition to BNSF's motion to dismiss have been filed by John D. Fitzgerald, on behalf of the United Transportation Union-General Committee of Adjustment, and by the Brotherhood of Maintenance of Way Employees.

In its motion to dismiss, BNSF argues that it retained the trackage rights when it leased the line to P&WR. Alternatively, BNSF renews its argument that the trackage rights are incidental to the lease transaction. The draft decision finds that BNSF did not retain the trackage rights as evidenced by the language of the Trackage Rights Agreement, the lease agreement, and P&WR's prior characterization of the lease transaction in its verified notice of exemption in STB Finance Docket No. 34255. Rather, this is a grant back of trackage rights and separate authorization is required and has been granted. The cases cited by BNSF in support of its position, including Minnesota Northern Railroad, Inc. — Exemption — Acquisition and Operation of Rail Line and Incidental Trackage Rights from Burlington Northern Railroad Company, STB Finance Docket Nos. 33315, et al. (STB served Aug. 14, 1997), where the lease agreement specifically stated that BNSF reserved overhead trackage rights, are distinguishable from the facts of this case where BNSF did not specifically reserve the trackage rights.

As to BNSF's second argument, the trackage rights here do not fall within the scope of trackage rights that have been deemed incidental to the acquisition and/or operation of a rail line. This is not a grant of trackage rights to a purchaser or lessee by the seller or the assignment of trackage rights to the purchaser or lessee to operate over the line of a third party that occurs at the time of the acquisition or operation. BNSF suggests broadening the concept of incidental trackage rights to include circumstances in which a lessee agrees to grant overhead trackage rights back to the lessor over the leased rail line. The draft decision would not adopt the broader reading of incidental trackage rights.

That concludes my statement. If you have any questions, we will be happy to answer them.